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Supreme Court of the United States

OCTOBER TERM, 1993

LAURA GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the military judge erred to the substantial prejudice of the petitioner by admitting, over defense objection, a urine sample and the results of the tests on that urine, where the prosecution failed to establish a proper chain of custody over the sample.

Whether the method of appointing military officers to duty as trial and appellate judges violates the appointments clause of the Constitution and the lack of any fixed term for those judicial offices violates the due process clause of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Laura Gonzales, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in her case on September 20, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 37 MJ 456 (CMA 1993) (Appendix A). The opinion of the United States Air Force Court of Military Review, issued on February 14, 1992 is unpublished. (Appendix B).

JURISDICTION

The final opinion of the United States Court of Military Appeals was entered on September 20, 1993. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

On 28 October 1988, pursuant to a random inspection, appellant reported to provide a urine sample. (Pros. Ex. 3) Staff Sergeant (SSgt) Tracy Hall served as the observer for the appellant and one other female on that date. (R. 603) At trial, SSgt Hall testified concerning her observations when the appellant provided the urine sample. She also testified regarding the subsequent handling of the sample, up to the time it was turned over to SSgt Brown, the assistant urinalysis program monitor.

In brief, SSgt Hall stated that she remembered being given only one container, a wide-mouthed cup, in which to collect the appellant's urine sample. (R 613) She said that she had difficulty removing the wide-mouthed cup from the plastic wrapper surrounding it. (R. 560) SSgt Brown, the assistant urinalysis program monitor, testified that the wide-mouthed cups are contained in "plastic shrink wrap." (R. 540) SSgt Hall identified the container into which appellant urinated as a wide-mouthed cup, with a screw top, similar to Def. Ex. C (R-613) In response to a question by the military judge, SSgt Hall specifically remembered appellant urinating into the wide-mouthed cup. (R. 564) After the appellant urinated into the wide-mouthed cup, she handed the unsealed urine container to SSgt Hall. (R. 530) SSgt Hall then sealed the same wide-mouth container and carried it to SSgt Brown. (R. 617) SSgt Hall further testified that it was this wide-mouthed cup that she handed to SSgt Brown. (R. 614)

Notwithst[illegible] urine in the only bottle she [illegible] never transferring or witnessing the transfer [illegible] other bottle, she stated that the urine container she [illegible] was a *small*-mouth urine sample bottle, Pros. Ex. 6. (R. 614) SSgt Hall asserted that her eyes *never* left appellant's sample from the time it was provided in the wide-mouthed cup, until she initialled the small-mouth urine sample bottle. (R. 567) Despite this constant observation of the sample, SSgt Hall could not explain how or when appellant's urine had been transferred from the wide-mouth cup, into which appellant urinated, to the small-mouth urine sample bottle, that Hall initialled and which was subsequently sent to the Air Force Drug Testing Laboratory for testing. (R. 614) Even after "racking [her] brain," Hall could not recall or explain the transfer. (R. 618)

Contrary to SSgt Hall's very specific recollections concerning this specific case, SSgt Brown testified that he had no independent memory of SSgt Hall giving him appellant's urine sample. Nevertheless, he averred that if he followed proper procedures he would not have accepted a sample that was contained in a wide-mouth catch cup, similar to Def. Ex. C. (R. 541) Furthermore, he alleged that if he had accepted a sample contained in a wide-mouthed cup he would have made a memo for record concerning the incident. (R. 541) He testified that no such memo exists regarding appellant's sample. (R. 541)

The small-mouth urine bottle sample tested positive for cocaine. (Pros. Ex. 3) This test result was the only evidence admitted on the charge that appellant had wrongfully used cocaine.

On 18-22 and 25-28 July 1989, the petitioner was tried by general court-martial at Elmendorf AFB, Alaska. Defense counsel objected to the admission of the sample bottle and the

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urinalysis results of the urine sample contained in that bottle. (R. 557) The basis for the objection was the absence of a valid chain of custody showing that the sample tested was the urine sample provided by appellant. (R. 557) The military judge overruled the defense objections. (R. 570) In so doing, the military judge asserted the following:

> Staff Sergeant Hall obviously has some difficulty remembering the details of exactly what happened in the bathroom, and remembers only a wide mouth container being taken into the bathroom.
>
> That certainly will effect the weight of her testimony, but in my mind she said three critical things. First, that she observed the accused urinate, and that that urine was under her constant super—observation. Secondly, that the urine coming from the accused's body was the urine that was ultimately placed in Prosecution Exhibit 5, and was in Prosecution Exhibit 6 when Staff Sergeant Brown sealed it, and Sergeant Hall placed her initials on it. Third, that the urine was not tampered with or altered while under her observation.

(R. 570-71)

After SSgt Hall testified regarding the two bottles, that is, the one appellant urinated into and the bottle Hall gave to Brown, defense counsel made a motion to dismiss and renewed the motion for due process violations. According to counsel:

> We had no idea until this woman came into this court yesterday and testified at the 39(a) that she had said that there was only one bottle that she remembered. That certainly was not what she was saying at the Article 32 hearing. . . . [T]here was certainly no

> notice to the Defense that she had actually told members of the United States that she had no memory of the second bottle, and we found that out after jeopardy had attached in this trial. Up until that time, this witness was just a routine witness . . . who was going to testify fairly consistent [, that] the procedures . . . had been followed.

(R. 689)

Petitioner was found guilty, contrary to her pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice [hereinafter cited as UCMJ]. She was sentenced to a bad conduct discharge, and reduction to the grade of E-3. The convening authority approved the sentence as adjudged on 19 March 1990.

On 14 February 1992 the Air Force Court of Military Review affirmed the finding and sentence. (Appendix B) Petitioner then submitted a Petition for Grant of Review with the United States Court of Military Appeals. On August 5, 1992, that Court granted appellant's Petition and ordered the submission of additional briefs. After hearing oral argument, the Court of Military Appeals affirmed the lower court's decision. (Appendix A)

With respect to the second question, this petition incorporates essentially the same brief which was submitted by United States Navy counsel in *Weiss v. United States*, No. 92-1482, and by United States Army counsel in *Barkley v. United States*, No. 92-1646, and *Doucette v. United States*, No. 93-68. Like *Weiss*, this petition raises two closely related questions (merged here into Question 2) which go to the heart of judicial independence for military trial and appellate judges, almost all of whom are commissioned officers and lawyers on active duty. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the

advice and consent of the Senate. Nor are they appointed for fixed terms.

Instead, military judges are selected and appointed by the Judge Advocate General of their respective service for such periods of time as the Judge Advocate General determines. The decision to select, transfer and reassign officers to and from their judicial duties is absolute and discretionary. In other words, those judges lack any protection from being removed and/or reassigned in the event the Judge Advocate General is not satisfied with their opinions, rulings or service.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf,* 35 MJ 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." UCMJ Art. 48, 10 USC § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal sentencing guidelines. *See United States v. Brown,* 28 MJ 470, 474 n.3 (CMA 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States,* 7 MJ 216 (CMA 1979).

Additionally, these courts exercise an "awesome, plenary, *de novo* power of review." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence. . . . as it finds correct in law and fact . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact." UCMJ Art. 66(c), 10 USC § 866(c) (1988).

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's claims with respect to judicial appointment and tenure. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 MJ 450 (CMA 1992).[1] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, 103 S. Ct. 2412 (May 24, 1993).

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 US 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 US 11 (1955), and *Palmore v. United States*, 411 US 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retalia-

[1] A petition for writ of certiorari in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the due process issue.

tion for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precluded fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C., area, or for courts-martial that are held in peacetime.

REASONS FOR GRANTING THE WRIT

I. THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF PETITIONER BY ADMITTING, OVER DEFENSE OBJECTION, A URINE SAMPLE AND THE RESULTS OF THE TESTS ON THAT URINE, WHERE THE PROSECUTION FAILED TO ESTABLISH A PROPER CHAIN OF CUSTODY OVER THE SAMPLE.

In *United States v. Nault,* 4 MJ 318 (CMA 1978) the United States Court of Military Appeals established that "fungible evidence becomes admissible and material through a showing of continuous custody which preserves the evidence in an unaltered state." *Id.* at 319. In the case *sub judice,* the appellant's urine was "neither readily identifiable, marked distinctively, nor possessed of individual characteristics." *Nault,* at 319, *citing McCormick's Handbook of the Law of Evidence* § 212 (2d ed. 1972). The urine sample was rendered identifiable only by its wide-mouth container. The testing of the contents of a small-mouth urine sample bottle was a fungible substance, without any chain of custody to tie it to any particular person. But fungible evidence is admissible and material only "through a showing of continuous custody which preserves the evidence in an unaltered state." *Id. citing United States v. Jones,* 404 F Supp 529, 542 (DCEDPa 1975); *United States v. Bass,* 8 USCMA 299, 24 CMR 109 (1970).

The absence of a chain of custody also renders the test results inadmissible. A chain of custody is necessary to estab-

lish that the sample provided by the appellant was the same sample tested by the laboratory. Absent this evidence "the laboratory analysis was neither relevant nor admissible." *United States v. Courts*, 9 MJ 285 (CMA 1980). While not every person who handled the fungible evidence is required to testify, there can be no appreciable gaps in accountability and control over the evidence. *See Nault*, at 320.

It should be made clear at the outset that this issue is not capable of being resolved by imposing a presumption of regularity. Such a presumption is ordinarily applied to the handling of samples in a controlled laboratory setting, or in those situations where there are unsupported attacks upon the chain of custody. The Court of Appeals has wisely drawn a distinction between normal and irregular handling of urinalysis evidence:

> Unlike our willingness to presume regularity of systematic handling on the part of neutral chemical analysts, we cannot formulate any presumption regarding the performance of prosecutorial custodians of real evidence in the absence of proper demonstration.

Nault at n. 8. The break in custody in the instant case occurred before the sample was even marked to go to the laboratory, and SSgts Hall and Brown were hardly models of laboratory precision and regularity. It is also critical to the application of this presumption that there are no demonstrated irregularities, thus " 'a lack of break in the chain of custody' is a key to the presumption of regularity which a court may accord to a laboratory." *United States v. Carrott*, 25 MJ 823, 825 (AFCMR 1988) *citing United States v. Strangstalien*, 7 MJ 225, 229 (CMA 1979). In the instant case the absence of a chain of custody for the period between acquiring the sample and its testing undermines any such presumption of regularity to be accorded laboratory results.

In deciding this issue of admissibility below, the Air Force Court of Military Review went back to its analysis of a similar issue in *United States v. Carrott*, 25 MJ 823 (AFCMR 1988). There the court held that the ruling of a military judge with regard to chain of custody issues would not be disturbed absent a clear abuse of discretion. *Carrott* at 824. That analysis was in turn based upon an earlier decision by the court below in *United States v. Hudson*, 20 MJ 607 (AFCMR 1985). In *Hudson*, the defense made unsupported assertions of irregularity to attack the positive urinalysis results, specifically that the testing facility was sloppy and may have made a mistake. *Hudson* at 608. This is a common defense tactic, but it is completely different from the case at bar in that they were *unsupported* attacks, as opposed to the distinct challenge to a portion of the chain of custody present in the instant case. Since *Carrott* and *Hudson* the Court of Appeals has clearly delineated these two issues.

Cases in which the accused makes an unsupported assertion of irregularities are really challenges to the inference of wrongfulness. In *United States v. Thompson*, 34 MJ 287 (CMA 1992), the defense contended that "the presence of benzoylecgonine could have occurred as a result of adding raw cocaine to his urine sample." *Id.* at 290. In other words, the sample submitted by the accused might have been tampered with at a later time by adding a small amount of cocaine which in turn tested positive for the drug. The chain of custody was not directly challenged, nor was specific evidence of an irregularity produced. *Id.* at 288. In *United States v. Ford*, 23 MJ 331, 335-6 (CMA 1987) the Court of Appeals explained that

> [t]his defense evidence challenges the basis in fact upon which the inference of wrongfulness is predicated. . . . It was offered by the defense to create reasonable doubt in the factfinders' minds concerning the prosecutions' circumstantial proof of use. A

> conflict in evidence concerning the existence of the predicate fact, however, does not bar use of the inference . . .

Thompson at 290-1. Thus the *Thompson* Court held that "evidence consistent with the possibility of tampering with a person's urine sample does not *per se* preclude a circumstantial finding of drug ingestion." *Thompson* at 291. This is true, of course, because the basis of the attack is on the *inference*, not the chain of custody. It also explains why the *Hudson* analysis employed by the court below is inapplicable to the case at bar.

The correct standard to be applied to the case *sub judice* was clearly explained by the Court of Appeals in a line of cases which address the chain of custody and irregularities therein. In *United States v. Pollard*, 27 MJ 376 (CMA 1989), the Court held that "the military judge is responsible for determining if the finders of fact, *i.e.*, the court-martial, can reasonably decide whether a urine sample originated from appellant and was tested without adulteration by any intervening agent or cause." *Id.* at 377. This determination by the military judge was later explained more precisely as questions of fact for the military judge. As such they are not disturbed "unless they are unsupported by the evidence or are clearly erroneous." *United States v. Strozier*, 31 MJ 283, 287 (CMA 1990) citing *United States v. Burris*, 21 MJ 140, 144 (CMA 1985). Petitioner asserts that this case presents just such a scenario.

In the instant case, the observer had a very specific memory of the wide-mouth container into which appellant urinated. She also had a very specific recollection of handing that wide-mouthed container to SSgt Brown. SSgt Brown has no specific recollection being handed appellant's urine sample, relying only on his belief that had he received such a container he would probably have refused it or made a notation. Relying on SSgt Hall's specific recollection of this incident, one would

conclude that the urine tested was *not* the appellant's. SSgt Hall handed appellant's urine to SSgt Brown in a wide-mouthed container, then at some later time initialled a small-mouth container, having never seen the contents of the one poured into the other, despite never taking her eyes off the urine. But, it was the small-mouthed bottle that was shipped to the Drug Testing Laboratory and tested. No explanation exists as to how appellant's urine could have been transferred from the wide-mouthed container to the small-mouthed bottle without being noticed by SSgt Hall if, as she testified, she never took her eyes off the sample.

The court members were obviously concerned by the absence of an explanation regarding the transfer. (R. 669, 855) The problem is further complicated by two points. First, written instructions for the observer existed. (Pros. Ex. 1) Second, there is no testimony that the instructions were complied with by the observer. (R. 631) In fact, the observer's testimony clearly indicates that she did not follow the instructions. (*Compare* App. Ex. XIII, IO Ex. 6 and R. 530)

The "findings" of the military judge are erroneous because they are unsupported in the record. Because the observer did not remember the transfer, the military judge "helped" her by concluding that 1) the urine was under SSgt Hall's constant observation, that 2) the accused's urine was ultimately placed in Prosecution Exhibit 6, and 3) the urine was not tampered with in any way. (R. 570-1) Without a specific link between the wide mouth container that the appellant urinated into and the small-mouth container whose contents tested positive, it is simply impossible to unilaterally conclude any of these things. Clearly there is no evidence upon which to make either of these conclusions. In fact, the inconsistency between SSgt Hall's testimony that she had the sample under constant observation and the fact that she could not explain the alleged container transfer renders these conclusions patently unreasonable. Thus, the judge's conclusions are entitled to no

weight by this Court, as they are unsupported by the record. In short, the military judge failed to "*reasonably decide* whether a urine sample originated from appellant and was tested without adulteration by any intervening agent or cause." *Pollard*, at 377 (emphasis added). The necessary emphasis here must be upon whether the military judge's conclusions were reasonable, in view of the total absence of evidence that would explain the switch in containers. Unlike the military judge in *Strozier*, the military judge in the instant case did not acknowledge or appreciate his appropriate role as a fact-finder (as defined in *Pollard* and *Strozier*) and made his own unsupported conclusions. These are errors of law and fact, which fly in the face of the "reliability, and ultimately relevance, [which] applies to the collection, transmission and testing of a urine sample." *Strozier* at 288.

The Court of Review applied the *Hudson* abuse of discretion standard and erroneously adopted the conclusions of the military judge as fact. The Court of Appeals found that the military judge's factual findings were supported by the record and not clearly erroneous and affirmed. *Gonzales*, 37 MJ 456. Petitioner respectfully disagrees. What the military judge encountered at trial was a blatant contradiction. SSgt Hall said that she never let the urine sample of the Petitioner leave her sight, and yet, she had no idea how the sample got from one bottle to another. At this point the military judge inexplicably simply chose to believe that the observer was confused and found that way. While the record could support an appropriate factual finding, it does not somehow authorize this wholesale departure from the evidence presented, specifically, that the government could not close up the gap in the chain of custody with the testimony of its witnesses. Therefore there is a question of law and fact fully reviewable by this court. *United States v. Vicknair*, 610 F.2d 372, 379 (5th Cir.), *cert. denied*, 449 US 823 (1980).

II. THE METHOD OF APPOINTING MILITARY OFFICERS TO DUTY AS TRIAL AND APPELLATE JUDGES VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION AND THE LACK OF ANY FIXED TERM FOR THOSE JUDICIAL OFFICES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

This petition, like *United States v. Weiss*, seeks to establish minimum standards for the appointment of military judges and their retention in office for fixed terms. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment, are available to those who are tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violations would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every just system requires.

A. The Appointments Clause Violation

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. US Const. Art. II, § 2, Cl. 2, *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 US 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford

and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers must be made by one of the authorities set forth in that clause.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who serve in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the due process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

B. The Due Process Violation

The reasons the Court should grant review on this question are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two issues presented in this question arise under different constitutional provisions, the defects involve common con-

cerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military judges, yet he is also responsible for supervising the efficient working of the military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 US 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioner believes that respect for state legislative judgments and concerns of federalism, which loomed so large in *Medina*, have no place where federal due process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other claimed protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable chilling influences of adverse or "faint

praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility to involuntary early retirement for all military judges.

The Court below has failed to justify this massive exception to the generally accepted principle of American jurisprudence that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for an accused, as reflected in such due process cases as *Tumey v. Ohio*, 274 US 510 (1927), and in the nearly universal fact that state judges serve for fixed terms of office.

CONCLUSION

The petitioner's case is a worthy one for a grant of certiorari. Review of this case is crucial because it represents the epitome of injustice directly attributable to appellate timidity and inability to recognize the impermissible usurpation of authority perpetrated by the military judge at trial. The result is unbelievable: a military judge has found as *fact* that which the prosecution could not prove with its eyewitness! Furthermore, the military appellate judiciary has deferred to this usurpation simply because they can envision circumstances under which such a scenario could occur. This creates a precarious judicial imbalance for the Petitioner: she is successfully prosecuted for using a drug based solely upon the prosecution assertion that their lab and their expert found a metabolite of cocaine in urine that an observer cannot directly say belongs to Petitioner but that everyone is willing to assume is hers because the military judge says so. On top of that, the government is entitled to a presumption of regularity with their lab and experts and the jury can *infer* wrongfulness on the part of the Petitioner simply because the defense cannot mount specific evidence of innocence. Surely such a system should not now be allowed to be even further eroded down this path

of *presumption of guilt without direct evidence* based simply upon the fact that the usurpation in question was authored by a trial judge. The military justice system needs to be tethered and drawn back to the basic tenets of fundamental fairness from which it has slowly but steadily strayed. In short, this Honorable Court must grant review to restore respectability to this military judicial system.

Respectfully submitted,

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December 1993

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,999.
CMR No. 28453.

UNITED STATES, APPELLEE

v.

LAURA GONZALES, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued March 4, 1993.
Decided Sept. 20, 1993.

For Appellant: *Captain Robert A. Parks* (argued); *Colonel Terry J. Woodhouse* (on brief); *Major Alice M. Kottmyer, Major Mary C. Yastishock, Captain Richard W. Aldrich.*

For Appelle: *Captain David C. Wesley* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis* and *Captain David G. Nix.*

Opinion of the Court

WISS, Judge:

A general court-martial composed of officer members rejected appellant's not-guilty pleas and convicted her of a single

specification of using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Thereafter, the court members sentenced her to a bad-conduct discharge and reduction to the grade of E-3. The convening authority approved these results, and the Court of Military Review affirmed in an unpublished opinion dated February 14, 1992.

On appellant's petition, we granted review to consider her claim that the military judge had erred when he overruled her chain-of-custody objection to urinalysis evidence. 36 MJ 195. Based on the military judge's findings of fact that are supported by the evidence, we hold that his ruling—that there was sufficient probability that the evidence had not been changed in any important respect—was supported by the record and was not clearly erroneous. *See United States v. Courts*, 9 MJ 285, 291 (CMA 1980).

I

The only evidence besides expert testimony supporting appellant's conviction is the report of the laboratory analysis on a urine sample submitted as hers. The relevance of the report in this trial, naturally, depends on whether the urine tested was appellant's. *See id.* at 290. The thrust of the defense challenge to the evidence in question is that, due to a break in the chain of custody of appellant's urine sample prior to the time it was sealed and marked for transport to the laboratory, the prosecution has not established that the urine tested was appellant's.

This excerpt from the opinion of the Court of Military Review summarizes the evidentiary basis of the defense objection:

> Staff Sergeant Hall had been detailed to observe as Sergeant Gonzales provided the [urine] specimen [during a unit-wide inspection for illegal

> drugs]. She remembers entering the ladies' room with only a wide mouth container, watching while appellant urinated into it, screwing the cap back on this same wide mouth container, and carrying it back to the collection station [and giving it to Sergeant Brown]. She remembers initialing the regular small mouth container (in which specimens are shipped to the laboratory) after it had been sealed. The urine was never out of her sight but she had no recollection of how the urine got from the wide mouth container to the small mouth container.

Unpub. op. at 1-2. After litigation of whether this lack of recollection constituted a fatal missing link in the chain of custody, the military judge concluded as follows in overruling the defense objection:

> Staff Sergeant Hall obviously has some difficulty remembering the details of exactly what happened in the bathroom, and remembers only a wide mouth container being taken into the bathroom. That certainly will affect the weight of her testimony, but in my mind she said three critical things. First, that she observed the accused urinate, and that that urine was under her constant super—observation. Secondly, that the urine coming from the accused's body was the urine that was ultimately placed in Prosecution Exhibit 6 [small mouth jar], and was the urine in [that jar] when Staff Sergeant Brown sealed it, and Sergeant Hall placed her initials on it. Third, that the urine was not tampered with or altered while under her observation.
>
> The Government's burden of demonstrating an adequate chain of custody is satisfied by showing that fungible evidence has been preserved in an unaltered

> state. The Court must be satisfied by the Government's proffer that in reasonable probability the relevant evidence, the urine sample in this instance, was not changed in important respects. That quote comes from *U.S. v. Carrot [Carrott]*, 25 MJ 823-824 (AFCMR 1988). Accordingly, . . . I should say . . . I'm reasonably satisfied with the chain of custody of the urine. . . .

II

To rebut a chain-of-custody challenge to admission of evidence, the prosecution is not required to "exclude every possibility of tampering." Instead, *Courts* says that its burden is to satisfy the military judge "that in reasonable probability the article ha[s] not been changed in important respects." 9 MJ at 291, quoting *West v. United States*, 359 F.2d 50, 55 (8th Cir.), *cert. denied*, 385 U.S. 867, 87 S.Ct. 131, 17 L.Ed.2d 94 (1966). Where the evidence in question is "fungible,"[1] this degree of assurance may, as a practical matter, be more difficult to reach; indeed, "[g]enerally fungible evidence becomes admissible and material through a showing of continuous custody which preserves the evidence in an unaltered state." *United States v. Nault*, 4 MJ 318, 319 (CMA 1978).

The defense attack on appellant's urine focuses on the time between Hall's delivery to the collection station of the urine in

---

[1] Certainly appellant's urine was "fungible" at that point. There was nothing distinctive about her urine that would differentiate it from other urine or that would differentiate it from her urine which might be tampered with in some way. Further, there was nothing distinctive about its "packaging" that would make it anything other than fungible, since the containers were typical of those provided by the Government for urinalysis inspections. *Cf. United States v. Courts*, 9 MJ 285 (CMA 1980); *United States v. Fowler*, 9 MJ 149 (CMA 1980); *United States v. Nault*, 4 MJ 318 (CMA 1978).

the wide-mouth collection container and her initialing the urine as appellant's in the sealed small-mouth container in which the sample was sent to the laboratory. The military judge, however, found as fact that the urine never left Hall's sight from the point at which appellant handed her the sample in the wide-mouth container until she initialed the small-mouth container and that, during that time, the sample was not tampered with in any way. These findings are solidly based on Hall's testimony during follow-up questioning by the military judge as follows:

> Q. You remember the accused urinating into the wide mouth container?
>
> A. Yes, sir.
>
> Q. You remember putting the cap on that container?
>
> A. Yes sir.
>
> Q. You remember patting it off?
>
> A. Yes, sir.
>
> Q. And you remember that container—you carrying that container up to where Sergeant Brown was waiting?
>
> A. Yes, sir.
>
> Q. Was the urine specimen that was in that container in any way tampered with or adulterated in any fashion in the time that you had it in your possession?
>
> A. No, sir.
>
> Q. Okay, so the urine specimen is now in the wide mouth container, and do you remember giving it to Sergeant Brown?
>
> A. Yes, sir.
>
> Q. Do you remember observing Sergeant Brown as he was doing the things to the bottle that you testified about earlier?

A. Yes, sir.
Q. Did you keep the specimen in your constant vision while all that was being done?
A. Yes, sir.
Q. And then you initialed the label on that bottle?
A. Yes, sir.

Given the specific findings by the military judge, which are supported by this evidence of record, we are satisfied that the military judge did not err by concluding that the chain of custody during the relevant time period was established. Hall's lack of specific recollection of how appellant's urine got from the wide-mouth container to the small-mouth container goes to the weight of the evidence, as the judge observed; but her specific and unqualified testimony that the urine never left her sight until it was in the small-mouth container and that, to that point, it was not tampered with or adulterated in any fashion leaves no missing link in the chain of custody.[2]

III

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

[2] Additionally, as to any claimed deviations from standard collection and custodial procedures, for the same reasons we are equally sure that the military judge did not err by concluding that, nonetheless, the evidence had sufficient reliability to be considered by the factfinders. *See United States v. Strozier*, 31 MJ 283 (CMA 1990); *United States v. Pollard*, 27 MJ 376 (CMA 1989).

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APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 28453

UNITED STATES

v.

STAFF SERGEANT LAURA GONZALES, FR585-04-9598
UNITED STATES AIR FORCE.

---

14 February 1992

Sentence adjudged 28 July 1989 by GCM convened at Elmendorf Air Force Base, Alaska.

Military Judge: Robert N. Spencer.

Approved Sentence: Bad-conduct discharge and reduction to E-3.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Major Ronald G. Morgan.

Appellate Counsel for the United States: Colonel Robert E. Giovagnoni, Lieutenant Colonel Brenda J. Hollis, and Captain David G. Nix.

Before

O'Brien, Pratt, and McLauthlin
Appellate Military Judges.

OPINION OF THE COURT

O'Brien, Chief Judge:

Two months short of her thirtieth birthday, Staff Sergeant Laura Gonzales was selected to participate in a unit-wide inspection for illegal drugs. She provided the required urine sample, and later the base was notified that it had tested positive for cocaine. A lapse in the memory of one of the prosecution's chief witnesses, Staff Sergeant Tracy Hall lies at the base of appellant's first three assignments of error.

Staff Sergeant Hall had been detailed to observe as Sergeant Gonzales provided the specimen. She remembers entering the ladies' room with only a wide mouth container, watching while appellant urinated into it, screwing the cap back on this same wide mouth container, and carrying it back to the collection station. She remembers initialing the regular small mouth container (in which specimens are shipped to the laboratory) after it had been sealed. The urine was never out of her sight but she has no recollection of how the urine got from the wide mouth container to the small mouth container. The following exchange during Sergeant Hall's re-cross examination, neatly summarizes over one hundred pages of her testimony.

Questions by the Civilian Defense Counsel.

> Q. This is what you initialed, number 6? [small mouth bottle]
>
> A. Yes, sir.
>
> Q. This [large mouth bottle] is what you carried into the latrine, got the urine into, screwed the top on, and handed back to the technician, right?
>
> A. Yes, sir.
>
> Q. This [small mouth bottle] is the one you initialed?
>
> A. Yes, sir.

Q. This [large mouth bottle] is the one you collected, right?

A. Hm-mmm. (Yes)

Q. To your personal knowledge this one [small mouth] was not involved in the collection process?

A. Not that I can remember.

Q. Can you explain to us how?

A. No, sir.

Q. You tried to think about this?

A. I've been in there racking my brain.

Q. Racking your brain meaning know—

A. Thinking about what I, you know, I don't remember it.

Q. Okay, knowing the importance, racking your brain, can you explain to us how you collected in here [wide mouth bottle] and initialed here [small mouth bottle]?

A. No, sir.

Appellant urges that this "disconnect" requires reversal for any one of the following three reasons:

1. It created a fatal break in the chain of custody;

2. It leaves the evidence factually insufficient to sustain a finding of guilty; and,

3. That appellant was denied due process in that the prosecution failed to disclose this aspect of Sergeant Hall's testimony to them before trial.

Taking up the third objection first, we note that Sergeant Hall's identity was in no way hidden from the defense. She even testified at the Article 32 investigation. In his findings, the judge observed that her "Article 32 testimony was essentially what was said here in court." This asserted error borders on the frivolous.

The first two assertions both boil down to the alleged fatal break in the chain of custody. To put it another way, appellant urges that the evidence is insufficient because the chain of custody is missing a link. No matter how you phrase it, however, it lacks merit. As we said in *United States v. Carrott*, 25 M.J. 823 (A.F.C.M.R. 1988):

> The government's burden of demonstrating an adequate chain of custody is satisfied by a showing that fungible evidence has been preserved in an unaltered state. *United States v. Courts*, 9 M.J. 285, 290 (C.M.A. 1980); *United States v. Nault*, 4 M.J. 318, 319 (C.M.A. 1978). The court must be satisfied by the government's proffer that in reasonable probability, the relevant evidence, the urine sample in this instance, has not changed in important respects. *United States v. Courts, supra; United States v. Frost*, 19 M.J. 509 (A.F.C.M.R. 1984), *aff'd* 22 M.J. 386 (C.M.A. 1986). In ruling on chain of custody issues, the military judge has broad discretion, and his ruling will not be disturbed absent a clear abuse of that discretion. *United States v. Hudson*, 20 M.J. 607, 608 (A.F.C.M.R. 1985), *pet. denied*, 21 M.J. 32 (C.M.A. 1985).

The military judge found:

> Staff Sergeant Hall obviously has some difficulty remembering the details of exactly what happened in the bathroom, and remembers only a wide mouth container being taken into the bathroom. That will certainly effect the weight of her testimony, but in my mind she said three critical things. First, that she observed the accused urinate and that the urine was under her constant super—observation. Secondly, that the urine coming from the accused's body was the urine that was ultimately placed in Prosecution Ex-

> hibit 6 [small mouth bottle], and was the urine in Prosecution Exhibit 6 when Staff Sergeant Brown sealed it, and Sergeant Hall placed her initials on it. Third, that the urine was not tampered with or altered while under her observation.

The judge did not err in finding the existence of an intact chain of custody, his findings are well supported by the evidence and we adopt them as our own. In addition, with respect to the sufficiency of the evidence issue, we independently find that the facts are sufficient to convince us of appellant's guilt beyond a reasonable doubt. Article 66, UCMJ.

Pursuant to appellant's motion and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we have received two affidavits, one from appellant and the second from her civilian defense counsel. While they contain no specific prayer for relief, they reflect back on a 38 word sentence contained in trial counsel's final argument on findings. That sentence speculated on appellant's activities during a leave immediately before the urinalysis. Defense counsel immediately objected and made motions for a mistrial, and to dismiss for prosecutorial misconduct. We will assume that these submissions are intended to raise as an issue the correctness of the judge's adverse rulings on both the objection and the motions.

For us to reverse for prosecutorial misconduct, we would have to find the trial counsel's conduct to be not only improper, but in the context of this entire 941 page record, that it also prejudiced appellant's substantial rights so as to deprive her of a fair trial. *United States v. Sloan*, 30 M.J. 741 (A.F.C.M.R. 1990) *pet. denied* 32 M.J. 41; *United States v. Gabrels*, 33 M.J. 622 (A.F.C.M.R. 1991). The judge was satisfied that trial counsel's "misstatement of the evidence was a good faith misrepresentation." he went on to immediately give a curative instruction, and then individually questioned the members as to

their ability to comply with his instruction. We agree with his resolution of this issue.

Similarly we find no abuse of discretion in his denial of appellant's motion for a mistrial. *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990).

The remaining two invited issues are without merit and we resolve them against the appellant. The findings and the sentence are correct in law and in fact, and on the bases of the entire record are

AFFIRMED.

Senior Judge PRATT concurs.

Judge MCLAUTHLIN did not participate.

[SEAL]
OFFICIAL

/s/ Pamela D. Stevenson
PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

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Supreme Court, U.S.
FILED
JAN 21 1994
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No. 93-977

In the Supreme Court of the United States

OCTOBER TERM, 1993

LAURA GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecution failed to establish a proper chain of custody over a urine sample that formed the basis for petitioner's prosecution.

2. Whether the method of appointing military judges violates the Appointments Clause of the Constitution and whether the lack of a fixed term for military judges violates the Due Process Clause of the Fifth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 37 M.J. 456. The opinion of the Air Force Court of Military Review (Pet. App. 7a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 20, 1993. The petition for a writ of certiorari was filed on December 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted by a general court-martial of using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. 912a. She was sentenced to a bad-conduct discharge and reduction to airman first class (E-3). The convening authority approved the findings and sentence, and the Air Force Court of Military Review affirmed. The Court of Military Appeals affirmed.

Petitioner was selected to participate in a unit-wide inspection for illegal drugs. Staff Sergeant Tracy Hall was ordered to observe petitioner as she provided a urine sample for drug testing. Hall testified that she recalled entering the women's room with only a wide-mouthed container, watching petitioner urinate into it, replacing the cap on the container, carrying the container back to the collection station, and giving it to Staff Sergeant Brown, a urinalysis program monitor. Hall recalled initialing the small-mouthed container in which specimens are shipped to the drug testing laboratory after it had been sealed. Although she testified that petitioner's urine was never out of her sight during the entire procedure, she did not recall how the urine was transferred from the wide-mouthed collection container to the small-mouthed shipping container. Pet. 2-3; Pet. App. 8a. Petitioner was convicted of cocaine use based on the positive result obtained from testing petitioner's urine for metabolites of cocaine. Pet. App. 2a.

At trial, petitioner objected to the admission of the urinalysis results based on an inadequate chain of custody. In addressing the question whether Hall's lack of recollection of the transfer from one container to the other destroyed the chain of custody, the military judge ruled as follows:

> Staff Sergeant Hall obviously has some difficulty remembering the details of exactly what happened in the bathroom, and remembers only a wide mouth container being taken into the bathroom.
>
> That certainly will affect the weight of her testimony, but in my mind she said three critical things. First, that she observed the accused urinate, and that that urine was under her constant super—observation. Secondly, that the urine coming from the accused's body was the urine that was ultimately placed in Prosecution Exhibit 6 [the small-mouthed container], and was the urine in [that container] when Staff Sergeant Brown sealed it, and Sergeant Hall placed her initials on it. Third, that the urine was not tampered with or altered while under her observation.

Tr. 570-571. The judge then overruled petitioner's objection to the admission of the testing evidence based on the urine sample. Pet. 3-4.

ARGUMENT

1. Petitioner argues (Pet. 8-13) that Hall's lack of recollection effectively broke the chain of custody of petitioner's urine sample prior to the time it was sealed and marked for transport to the drug testing laboratory. Accordingly, she argues, the prosecution did not establish that the urine tested was petitioner's.

The military rules of evidence apply the following standard to authentication disputes based on a challenge to the chain of custody:

> The government's burden of demonstrating an adequate chain of custody is satisfied by a showing that fungible evidence has been preserved in an unaltered state. The court must be satisfied by the govern-

> ment's proffer that in reasonable probability the relevant evidence, the urine sample in this instance, has not changed in important respects. In ruling on chain of custody issues the military judge has broad discretion, and his ruling will not be disturbed absent a clear abuse of that discretion.

United States v. *Carrott*, 25 M.J. 823, 824 (A.F.C.M.R. 1988) (citations omitted).

The findings of the military judge, upholding the admission of the challenged evidence in this case, were based on Hall's testimony in response to the following questions from the judge:

> Q. You remember the accused urinating into the wide mouth container?
>
> A. Yes, sir.
>
> Q. You remember putting the cap on that container?
>
> A. Yes, sir.
>
> Q. You remember patting it off?
>
> A. Yes, sir.
>
> Q. And you remember that container—you carrying that container up to where Sergeant Brown was waiting?
>
> A. Yes, sir.
>
> Q. Was the urine specimen that was in that container in any way tampered with or adulterated in any fashion in the time that you had it in your possession?

A. No, sir.

Q. Okay, so the urine specimen is now in the wide mouth container, and do you remember giving it to Sergeant Brown?

A. Yes, sir.

Q. Do you remember observing Sergeant Brown as he was doing the things to the bottle that you testified about earlier?

A. Yes, sir.

Q. Did you keep the specimen in your constant vision while all that was being done?

A. Yes, sir.

Q. And then you initialled the label on that bottle?

A. Yes, sir.

Tr. 566-567. Because the judge's ruling was based on testimony supporting a finding that the urine sample came from petitioner's body, the judge's ruling on the chain of custody issue was not an abuse of discretion. The fact that the witness could not recall the transfer of the urine to the specimen bottle does not change that result. The witness testified that she never lost eye contact with the sample from the time it was provided until the time it was in the specimen bottle. That was sufficient to establish a sound chain of custody for the sample.

2. Petitioner next argues (Pet. 14-17) that the military trial and appellate judges in her case were appointed in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, and that the lack of fixed tenure

for the judges in her case rendered the proceedings against her fundamentally unfair. Those questions, however, were resolved in *Weiss* v. *United States*, No. 92-1482 (Jan. 19, 1994), where the Court rejected the arguments petitioner makes here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JEFFERY T. INFELISE
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Major, USAF
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JANUARY 1994